No. 76-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, *Petitioner*

v.

CITY OF ALBUQUERQUE, ET AL, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CORNELIUS J. FINNEN
Assistant City Attorney

GEORGE R. "PAT" BRYAN, III
City Attorney
City of Albuquerque
P. O. Box 1293

Albuquerque, New Mexico 87103
Counsel for Respondents

April 8, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1191

UNITED STATES OF AMERICA, *Petitioner*

v.

CITY OF ALBUQUERQUE, ET AL, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented as stated by the United States in its Petition is:

> "Whether an employer's duty, under Title VII of the Civil Rights Act of 1964, as amended, reasonably to accommodate an employee's bona fide religious practice of refraining from work on his Sabbath requires the employer to provide reasonable assistance to the employee in finding a substitute to work on his Sabbath."

Respondent, City of Albuquerque, does not believe that this question can properly be reviewed by this Court. *See* Reasons for Not Granting the Writ below.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Civil Rights Act of 1964 (78 Stat. 253, as amended, 42 U.S.C. Sec. 2000e, *et seq.*) and the regulations involved (29 C.F.R. 1605.1) are set forth in the Petition at pp. 2-3.

STATEMENT

The statement made in the Petition is generally sufficient. However, the Preliminary Statement found in the decision of the trial court below is more complete (*See* Petition App. B, pp. 14A-21A). It should also be noted that the decision in *Hardison v. Trans World Airlines*, 375 F.Supp. 877, reversed, 527 F.2d 33, certiorari granted, November 15, 1976, No. 75-1126, was only one of the many cases cited by Federal District Judge Palmieri in his Opinion. (Petition App. B pp. 34A, 36A-39A). Further, it is abundantly clear that the

Tenth Circuit was aware of *Hardison's* reversal and the granting of certiorari by this Court. (Petition App. A pp. 12A-13A).

REASONS FOR NOT GRANTING THE WRIT

1. The United States has petitioned for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. The "Question Presented" by the United States for review by this Court was not addressed by the Tenth Circuit. The United States asks whether Title VII of the Civil Rights Act of 1964 "requires the employer to provide reasonable assistance to the employee in finding a substitute to work on his Sabbath." The trial court made no findings or conclusions specifically referring to assistance in obtaining a substitute to work the Sabbath shifts. On the contrary, the only specific examples of further accommodation cited are:

a) a permanent switch in shifts (Conclusion 11)

b) a blanket grant of Sabbaths off (Conclusion 12)

c) substitution of Sunday duty for Sabbath shifts (Conclusion 12).

The Tenth Circuit in affirming the findings and conclusions made by the lower Court carefully framed the issue before it:

> "Did the City of Albuquerque and its fire department demonstrate that they had, through their rules and regulations, made reasonable efforts to accommodate Zamora's religious practices and that further accommodation would result in undue hardship? The trial

court found and concluded that such had been 'convincingly demonstrated.' We think such finds support in the record."

United States v. City of Albuquerque, 545 F.2d 110, 113 (1976).

This Court cannot review a question which has not yet been considered by the District Court or the Court of Appeals. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330; *Tyrrell v. District of Columbia*, 243 U.S. 1, 2.

2. The United States, in its Petition, asserts that there is a conflict among the circuits on the question presented. If this Court feels that the question presented herein was properly raised below, Respondent believes that any conflict among circuits on this question is more transparent than real.

The United States contends that there is conflict in the circuits by treating the questions of "reasonable accommodation" and "undue hardship" as the same issue, when, in fact, if the accommodation is found reasonable, the "undue hardship" test is never properly reached. *Ward v. Allegheny Ludlum Steel Corporation*, 397 F. Supp. 375, 377 (1975); *Shaffield v. Northrup Worldwide Aircraft Services, Inc.*, 373 F.Supp. 937, 941 (1974); *Claybaugh v. Pacific Northwest Bell Telephone Co.*, 355 F.Supp. 1, 6 (1973).

The United States relies heavily on the fact that the trial court below noted that the factual situation in *Hardison v. Trans World Airlines*, 375 F.Supp. 877 (W.D. Mo. 1974) was similar to the case at bar and that that opinion was subsequently reversed by the Eighth Circuit. *Hardison v. Trans World Airlines*, 527 F.2d 33 (9th Cir. 1975). What the United States fails to recognize is that the trial court below

was addressing the question of what situations create an "undue hardship" under the language of the statute involved and not the question presented herein relating to what constitutes a "reasonable accommodation." Unlike the case at bar, in *Hardison, supra*, the employer contended that it was precluded from making *any* accommodation by the terms of a bona fide collective bargaining agreement.

The United States also points to the decisions in *Cummins v. Parker Seal Co.*, 516 F.2d 544, affirmed by an equally divided Court, No. 75-478, November 2, 1976 and *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972) as conflicting with the case at bar. Similarly, a close look at the facts of *Cummins, supra*, and *Riley, supra*, indicates that the employer, in both cases, ultimately took the position that *no* reasonable accommodation was possible without imposing "undue hardship" on the business. These cases should be distinguished from the instant case in that the City of Albuquerque did not take such a position. Rather, the City attempted to make a reasonable accommodation of Zamora's religious beliefs through its Fire Department regulations.

3. The United States has requested that action on the Petition be deferred pending this Court's decision in *Hardison*. The United States claims that *Hardison* may be controlling over any decision by this Court in this case. Respondent, City of Albuquerque, requests that the instant Petition be acted upon independently of any action in *Hardison* for the following reasons:

a) *Hardison* involves a private employer rather than a governmental entity, and

b) the question presented by the United States for review in this case is not presented in *Hardison*.

The United States raises the significant factual difference between this case and *Hardison*. In its Reasons for Granting the Writ, the United States points out that *Hardison* involves a private employer whereas this case involves a governmental entity. The City of Albuquerque is in agreement with the conclusion of the United States that:

> "Because of this additional dimension in the present case, the Court's decision in *Hardison* may not be controlling here."

Respondent would only strengthen this statement to assert that *Hardison cannot* be controlling because of this factual difference.

It does not appear to Respondent that the questions presented for review on Writ of Certiorari in *Hardison* would have any bearing on the question for which review is sought here. Although the Petition for Writ of Certiorari filed in *Hardison* was not available to Respondent, a summary of the Petition at 45 U.S.L.W. 3051 listed the following as questions presented:

> "Questions presented: (1) Must employer, under 1964 Civil Rights Act and Establishment Clause of First Amendment, accommodate employee's religious practices even if it has to deprive, without union consent, more senior employees of their seniority rights under bona fide collective bargaining agreement and even if it has to pay overtime wages to replacement or deprive other work areas of coverage? (2) Did court of appeals improperly preclude employer with large labor force from demonstrating inability to reasonably accommodate without undue hardship religious practices of its employees? (3) Did court of appeals fail to follow Fed. R.Civ.P. 52(a) in holding district court's findings clearly erroneous and in effect trying matter de novo?"

The facts here do not involve any collective bargaining agreement. The Tenth Circuit affirmed the trial court's conclusion that the employer had demonstrated undue hardship in connection with any further accommodation. No question has been raised about the procedure followed by the Court of Appeals.

It therefore does not appear to Respondent that this Court's decision in *Hardison* will consider the issue raised here by the United States. There is clearly no reason to defer action here pending the *Hardison* decision. This Petition should be decided by the Court on its own merit, without undue delay.

4. After review of the case law on the issues of "reasonable accommodation" and "undue hardship," the City of Albuquerque submits that the Tenth Circuit was correct in its conclusion that:

> "A reading of all these cases leads us to conclude that to a very great degree each case turns on its own particular facts and circumstances." 545 F.2d 110, 115

The question posed for review by Petitioner could apply only in those cases where the factual situation was such that finding a substitute to work on the Sabbath was a real possibility. The precedential value of an answer to this question is limited.

Given the narrow scope of the question, and the number of petitions for Writs of Certiorari presented to this Court, the City of Albuquerque respectfully submits that granting the requested Writ would be an unnecessary and injudicious use of the Court's time and energy. If there is in fact a conflict among the Circuits in the area of "reasonable ac-

commodation'' and ''undue hardship,'' this case is not the appropriate vehicle for its resolution.

CONCLUSION

The Petition for Writ of Certiorari should be denied without deferral.

Respectfully submitted,

CORNELIUS J. FINNEN
Assistant City Attorney

GEORGE R. ''PAT'' BRYAN, III
City Attorney
City of Albuquerque
P. O. Box 1293
Albuquerque, New Mexico 87103

April, 1977